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No. 91-365

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARIUSZ KACZMARCZYK, JOZEF CZAJKOWSKI AND TADEUSZ KUSPER, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, in adjudicating petitioners' asylum applications, could take administrative notice of the change in government in Poland.

2. Whether the court of appeals had power to grant petitioners voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-17, is reported at 933 F.2d 588. The opinions of the Board of Immigration Appeals, Pet. App. 19-30, are unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. 18, was entered on May 31, 1991. The petition for a writ of certiorari was filed on August 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are natives and citizens of Poland. Each petitioner had belonged to or held a leadership position in Solidarity or a group sympathetic to Solidarity. Pet. App. 2-5. After entering the United States as visitors for pleasure, petitioners stayed longer than the period of time authorized by the Immigration and Naturalization Service. *Id.* at 2.

2. In separate hearings before an immigration judge, petitioners conceded deportability under 8 U.S.C. 1251(a)(2); see 8 U.S.C. 1184(a); 8 C.F.R. 214.2(b), and applied for asylum and withholding of deportation. The immigration judge denied petitioners' applications. Pet. App. 2-5.

3. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 19-30. In each case, the BIA took administrative notice that, effective September 10, 1989, the Solidarity organization formally entered into the coalition government currently ruling Poland. *Id.* at 20, 24, 29. The Board reasoned that, with this change in the government of Poland, petitioners do not have a well founded fear of persecution on account of their pro-Solidarity political opinion. *Ibid.*

4. The court of appeals denied the petitions for review. Pet. App. 1-17. It held that "the BIA may take official notice of uncontroverted facts concerning political conditions in asylum seekers' home countries, including Solidarity's role in the Polish government." *Id.* at 8. The court further held that "it was reasonable for the Board to conclude that Poland's changed political circumstances substantially diminished the likelihood that the Polish government would persecute Solidarity members and activists." *Id.* at 8-9. The court rejected petitioners' contention that Section 556(e) of the Administrative Procedure

Act, 5 U.S.C., entitles aliens in deportation hearings to rebut administratively noticed facts, because "the APA is not applicable to deportation proceedings under the [Immigration and Nationality Act]." Pet. App. 11. The court also rejected petitioners' contention that administrative notice of the change in Poland's government rendered their deportation proceedings fundamentally unfair. It explained that petitioners' ability to file a motion to reopen "is sufficient to satisfy the requirements of the fifth amendment's due process clause." *Id.* at 14.

The court of appeals denied petitioners' request to reinstate or extend their periods of voluntary departure. The court held that a grant of voluntary departure is within the sole discretion of the Attorney General and is not subject to judicial review. Pet. App. 16.

ARGUMENT

1. Contrary to petitioners' contentions, neither the Administrative Procedure Act nor the Fifth Amendment's Due Process Clause requires the BIA to give an alien in deportation proceedings notice and an opportunity to rebut an administratively noticed fact.

a. Although the Administrative Procedure Act permits parties to rebut officially noticed facts "when an agency decision rests on official notice of a material fact not appearing in the record," 5 U.S.C. 556(e), it is well settled that the APA does not apply to deportation proceedings. *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955); accord *Kapcia* v. *INS*, No. 90-9533 (10th Cir. Sept. 9, 1991), slip op. 6; see, *e.g.*, *Escobar* v. *INS*, 935 F.2d 650, 653 (4th Cir. 1991); *Ho Chong Tsao*

v. *INS*, 538 F.2d 667, 669 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977).[1]

Contrary to petitioners' contention (Pet. 8-9), no court of appeals has held that the APA applies to deportation proceedings. Petitioners rely entirely on the Third Circuit's decision in *McLeod* v. *INS*, 802 F.2d 89 (1986), and the en banc Ninth Circuit's decision in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988). In *McLeod*, the Third Circuit noted the APA's requirement of an opportunity to rebut officially noticed facts and held that that requirement was not violated in that case because the alien "did not request an opportunity to rebut" the fact of a change of government in Grenada. 802 F.2d at 94. Although that analysis presupposes that the APA applies to deportation proceedings, the Third Circuit assumed that premise without deciding the question. See *id.* at 93-94 & n.4. In other decisions, both before and after *McLeod*, the Third Circuit has made clear its view that deportation proceedings are not governed by the APA.

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[1] This Court held in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), that an alien may, in some circumstances, collaterally attack a final deportation order in federal district court. That decision was superseded by 8 U.S.C. 1105a(c), which limits judicial review of a final deportation order to a petition for review in the circuit court of appeals. Cf. *Jean* v. *Nelson*, 711 F.2d 1455, 1502-1503 (11th Cir. 1983), aff'd, 472 U.S. 846 (1985). More fundamentally, neither *Pedreiro* nor any other decision of this Court suggests that deportation proceedings are governed by the APA. Because petitioners' applications for asylum and withholding of deportation were made in deportation proceedings, they are "considered part and parcel of that process, *see Kashani* v. *Nelson*, 793 F.2d 818, 821 (7th Cir.), *cert. denied*, 479 U.S. 1006 (1986), *Carvajal-Munoz* [v. *INS*], 743 F.2d 562, 567 [(7th Cir. 1984)], [and] the APA's procedural entitlements are not applicable." Pet. App. 11.

Clarke v. *INS*, 904 F.2d 172, 174 (1990); *Giambanco* v. *INS*, 531 F.2d 141, 144-145 (1976).

In *Escobar Ruiz*, the Ninth Circuit held, for purposes of awarding attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A) and (d)(3), that a deportation proceeding is "an adjudication under section 554" of Title 5, or the APA. 5 U.S.C. 504(b)(1)(C). In reaching that result, however, the Ninth Circuit reasoned that an adjudication "under" the APA is one conducted in conformity to the APA. 838 F.2d at 1023. It recognized that if "under" meant "subject to" the APA, this Court's decision in *Marcello* might require a different result. 838 F.2d at 1025.[2]

b. Contrary to petitioners' contention (Pet. 10-12), the BIA's administrative notice of the change of government in Poland did not violate the Fifth Amendment's Due Process Clause. The court of appeals recognized that petitioners were entitled to "a 'meaningful opportunity to be heard,' *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976)," Pet. App. 11, but held that the BIA's "existing procedural framework provides asylum petitioners with a mechanism to rebut officially noticed facts," *id.* at 13. Accordingly, if petitioners had evidence that Poland's government had not changed, or that they still harbored a well-founded fear of persecution despite the change, they could have filed a motion to reopen their deportation proceedings or reconsider the orders of deportation. See 8 C.F.R. 3.2, 3.8; *INS* v. *Abudu*, 485 U.S. 94 (1988). The court of appeals found that "[t]his mechanism

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[2] Since the judgment below is correct regardless of this Court's decision on the applicability of EAJA to deportation proceedings, this case should not be held for *Ardestani* v. *INS*, No. 90-1141 (argued Oct. 8, 1991).

provides asylum applicants with an opportunity to present the Board with evidence that the facts it officially noticed are incorrect or that they are true but irrelevant to their case." Pet. App. 14.

Petitioners contend (Pet. 11-12) that motions to reopen or reconsider might not provide due process in cases in which the INS schedules immediate deportation, or in which the grounds for reopening might not compel this exercise of discretionary relief. But petitioners must assert their own due process rights, they "cannot rest a claim to relief premised on the legal rights or interests of third parties." *Powers* v. *Ohio*, 111 S. Ct. 1364, 1370 (1991); see *Mohsseni Behbahani* v. *INS*, 796 F.2d 249, 251 (9th Cir. 1986); *Vides-Vides* v. *INS*, 783 F.2d 1463, 1469 (9th Cir. 1986); *Figeroa* v. *INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Ka Fung Chan* v. *INS*, 634 F.2d 248, 258 (5th Cir. 1981); *Nicholas* v. *INS*, 590 F.2d 802, 809 (9th Cir. 1979). Petitioners have had ample time to rebut the BIA's administrative notice of the ascendance of Solidarity to the status of coalition partner in Poland, and have neither disputed that fact nor the irresistible inference that Solidarity sympathizers are not subject to persecution on account of political opinion in Poland.[3]

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[3] Although petitioners protest (Pet. 9-10) the BIA's inference that Solidarity's assumption of power undercut any objective basis for petitioners' fear of persecution, the court of appeals agreed that "it was reasonable for the Board to conclude that Poland's changed political circumstances substantially diminished the likelihood that the Polish government would persecute Solidarity members and activists." Pet. App. 8-9. It is well settled that an agency's administrative notice necessarily includes the drawing of inferences based on the agency's "common sense as much as its expertise." *NLRB* v. *Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1166 (2d Cir. 1976); *Kapcia* v. *INS*, slip op. 5. Those inferences must be

2. Petitioners contend (Pet. 12) that the court of appeals should have reinstated their period of voluntary departure, and that its refusal to do so will "chill" the filing of petitions for review.

Congress gave the Attorney General sole authority to grant voluntary departure. Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e), provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings * * * to depart voluntarily." The statute thus excludes the judiciary from reinstating voluntary departure. Cf. *INS* v. *Hector*, 479 U.S. 85, 88-90 (1986) (per curiam); *INS* v. *Phinpathya*, 464 U.S. 183, 194 (1984).

In any event, petitioners have received from the district director the administrative relief they sought and failed to obtain from the court of appeals. The District Director for the INS Chicago district office has granted petitioners the privilege of voluntarily departing the United States on or before January 15, 1992. Thus, if the Court denies the petition for a writ of certiorari before January 15, 1992, petitioners can voluntarily depart from the United States.

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upheld if they are "reasonable," rather than "hypothetical" or "remote from the realities of * * * existence." *NLRB* v. *Milk Drivers & Dairy Employees*, 531 F.2d at 1165; *Kapcia* v. *INS*, slip op. 6. "If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference." *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Cf. *McLamore* v. *Weinberger*, 538 F.2d 572, 575 (4th Cir. 1976) (agency's decision is supported by substantial evidence when it is within common knowledge and experience of ordinary person).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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